

**TESTIMONY OF
JOHN G. ZANDY, PARTNER – WIGGIN AND DANA
ON BEHALF OF
CONNECTICUT HOSPITAL ASSOCIATION
BEFORE THE
LABOR AND PUBLIC EMPLOYEES COMMITTEE
Thursday, February 24, 2005**

**HB 6225, An Act Requiring Recipients Of State Financial Assistance To Sign
Neutrality Agreements**

Good afternoon Senator Prague, Representative Ryan, and members of the Committee. My name is John Zandy, and I am a partner at the law firm of Wiggin and Dana. I am appearing here on behalf of the Connecticut Hospital Association and I appreciate the opportunity to testify on **HB 6225, An Act Requiring Recipients of State Financial Assistance to Sign Neutrality Agreements**.

HB 6225 would require a nonprofit organization that is receiving loans, grants, guarantees or tax abatements from the state or any of its agencies to sign a "neutrality agreement" prohibiting the organization from engaging in certain forms of activities that might deter union organizing (i.e. "(A) interfering in labor organizing and education campaigns, (B) interfering with or participating in the activities of labor organizations, (C) discriminating in hiring based on past labor organizing activity or to encourage or discourage membership in a labor organization, (D) persuading employees to support or oppose labor organizing activity, (E) harassing employees engaged in labor organizing activity, (F) preparing and distributing materials that advocate for or against labor organizing, and (G) hiring or consulting legal counsel or other consultants to advise the nonprofit organization on how to assist, promote or deter labor organizing or how to impede a labor organization that represents the nonprofit organization's employees from fulfilling its representational responsibilities".) We do not believe HB 6225 should be enacted for the following reasons.

First, HB 6225 is preempted by federal law. The preemption doctrine is anchored to the Supremacy Clause of the United States Constitution and confirms that it is within the power of Congress to legislate in the areas of labor relations and to exclude any concurrent power in the states. It was pursuant to that power that Congress created the National Labor Relations Board ("NLRB") as the independent federal agency entrusted to hold and regulate conduct relating to secret ballot elections in which employees vote for or against union representation. State laws that intrude into the province of the NLRB or federal labor relations policy are preempted and therefore invalid. The NLRB has gone on record that states are not free to use their spending power to pressure employers to adopt neutrality agreements, and that the assumption that has served as the basis for neutrality legislation, i.e. that partisan employer free speech interferes with free choice,

"is contrary to the federal policy, expressed in NLRA Section 8(c), to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." Section 8(c) of the NLRA protects "[t]he expressing of any views, argument, or opinion" by an employer so long as it does not contain a "threat of reprisal or force or promise of benefit."

The NLRB advanced its position to the Ninth Circuit Court of Appeals in the case of Chamber of Commerce vs. Lockyer, a case which involved a California law mandating neutrality in the face of union organizing for employers who receive state funds, and on April 20, 2004, the Court issued its decision agreeing with the NLRB that the statute was preempted. The Court held that the statute was preempted because it "both substantially and purposefully alters the balance of forces in the union organizing process, interfering directly with a process protected by the NLRA."

HB 6225 is substantively indistinguishable from the California law struck down by the Court in Chamber of Commerce vs. Lockyer. By allowing unions to campaign freely but prohibiting employers from being able to talk to their employees and present them with relevant facts and information to make an informed decision, HB 6225 would upset the balance of forces protected by the NLRA. As the NLRB successfully argued before the Court, employees benefit from open communications and "[a]mong the possible disadvantages of unionization that an employer might want to convey is that the particular union seeking to represent the employees may have a record of corruption, racial discrimination, violence, bribery, or misrepresentation. Even labor organizations, in their capacity as employers, have recognized such dangers and the importance of speaking out when, in their view, their employees may be about to make an unwise choice of bargaining representative." Under HB 6225, such relevant and vital information would likely never be brought forward and employees would be short-changed as a result.

Second, HB 6225 threatens to abrogate an employer's fundamental right to resort to lawful self-help by prohibiting employers from seeking advice from professionals, including legal counsel, concerning union organizing activities, while not imposing a similar ban on unions. In addition to altering the balance of power so carefully protected by the NLRA, this threatened prohibition also raises serious questions about an employer's right to counsel particularly because HB 6225 may force an employer to waive the attorney client privilege to prove compliance with the statute. Moreover, these concerns are not limited to use of counsel; for example, query whether a legislator would be a "consultant" under HB 6225 when he/she answers a healthcare employer's question about reimbursement rates if the employer presents this information to its employees while organizing is taking place? The list goes on.

Critics of the NLRA believe the law needs to be amended to better facilitate union organizing. If so, this is a job for Congress to take up, not the state legislature.

Thank you for your consideration of our position.